EARLY TRAITS OF THE ESSENTIALITY PRINCIPLE: A *(COUNTERINTUITIVE) EUROPEAN* LESSON FROM KARLSRUHE?

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Abstract

As the *PSPP* judgment's dust has settled down, the alleged priority of Union law reveals an intimately fragile background, which threatens the constitutional balance of the Union as a whole. This work recalls the Europe's constitutionalisation path and delves into the recent *BVerfG*'s case-law on the EU integration to uncover early traits of a legal principle – essentiality – that can be regarded as a general principle of Union law and has potential to promote equality among States and citizens as laid down in Arts. 4(2) and 9 TEU. Rooted in the *BVerfG*'s *Wesentlichkeitstheorie* and tied to a specific conception of human dignity as self-determination of free and equal persons, this principle entails that norms stemming from a mandate that is interpreted too extensively in relation to the political sensitivity of the effects sought cannot claim legal 'bindingness' until provided with an adequately renovated legal basis, duly backed by political responsibility.

Keywords

Constitutional identity; primacy; discretion; proportionality; constitutional pluralism; legal basis; essentiality.

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RASGOS TEMPRANOS DEL PRINCIPIO DE ESENCIALIDAD: ¿UNA LECCIÓN *EUROPEA* (POR CIERTO, *CONTRAINTUITIVA*) DESDE KARLSRUHE?

Resumen

Al depositarse el polvo del asunto *PSPP*, el anclaje constitucional de la primacía que se atribuye al Derecho de la Unión revela toda su fragilidad, lo que amenaza con perturbar el delicado equilibrio de la integración europea. Tras recorrer la trayectoria constitucional de la Unión, este estudio profundiza en la jurisprudencia del Tribunal Constitucional Federal alemán (*BVerfG*) para desvelar rasgos tempranos de un principio —el principio de esencialidad— que, considerándose como un principio general de derecho de la Unión, manifiesta su potencial en la promoción de la igualdad entre Estados y pueblos de Europa, tal como rezan los arts. 4(2) y 9 TEU. Este principio, arraigado en la teoría de la esencialidad forjada por el *BVerfG*, y vinculado a una precisa concepción de la dignidad humana —entendida como autodeterminación de personas iguales y libres— implica que toda norma basada en un mandato cuya interpretación es *demasiado extensa* en relación a la sensibilidad política de los efectos causados no puede reclamar obligatoriedad hasta que no encuentre apoyo en una base jurídica *adecuadamente renovada* mediante una explicita toma de responsabilidad por parte de las fuerzas políticas.

Palabras clave

Identidad constitucional; primacía; discrecionalidad; proporcionalidad; pluralismo constitucional; base jurídica; esencialidad.

LE DÉBUT DU PRINCIPE D'ESSENTIALITÉ: UNE LEÇON *EUROPÉENNE* (BIEN SÛR, *CONTRINTUITIVE*) DE KARLSRUHE?

Résumé

Au lendemain de l'arrêt *PSPP*, la primauté du droit de l'Union révèle toute sa fragilité, ce qui menace la stabilité de l'équilibre constitutionnel auquel s'est maintenu le procès d'intégration européenne. En parcourant la trajectoire de la constitutionnalisation de l'Union, cette étude aborde la jurisprudence du Tribunal Constitutionnel Fédéral allemand (*BVerfG*) pour mettre en lumière les caractères précoces d'un principe —l'essentialité— qui forme partie des principes généraux du droit de l'Union et qui a du potentiel pour promouvoir l'égalité des États et des peuples au sein de l'Union, selon disposent les arts. 4(2) et 9 TUE. Enraciné dans la théorie de l'essentialité forgée par le *BVerfG*, et vinculé à une conception spécifique de la dignité humaine comme auto-détermination de personnes libres et égales, ce principe exige qui chaque norme dont la base juridique est interprétée de manière *trop extensive* par rapport à la sensibilité politique des effets causés ne puisse pas réclamer de force

obligatoire sauf si sa base juridique est *adéquatement rénovée* à la suite d'une explicite prise de responsabilité par les forces politiques.

Mots clés

Identité constitutionnelle; primauté; discretionnalité; proportionnalité; pluralisme constitutionnel; dialogue judiciel; essentialité.

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I. INTRODUCTION. THE EUROPEAN INTEGRATION PROCESS: A POINT OF NO-RETURN?

The *golden age* of European constitutionalism (Balaguer Callejón, 2012: 99) sustained by the sincere faith in the Union's thundering progression towards constitutional completeness, seems nowadays a reliquary of the past (Somek, 2013: 561). The *PSPP* judgment[2] delivered by the German Constitutional Court (*BVerfG*) has made apparent that running the Union's machine is no longer *business as usual* but requires a review of its core mechanisms – chief among which is constitutional pluralism, *i.e.,* the formula of constitutional balance that has been undergirding the whole European Union (EU)'s integration path (Walker, 2002: 317).

Yet, this situation does not come out of nowhere: signs of a 'constitutional malaise' (Maurer & Schwarzer, 2007: 63) have popped up since the Constitutional Treaty's demise. However, the 2008 crisis – which hit the European construction at multiple stages of economic, socio-political, and constitutional relevance (Pernice, 2015: 541) – marked a turning point in this regard (Menéndez, 2013: 459). National constitutional courts have construed procedural and substantive tools to cushion the Union's law impact on what they held the 'political and constitutional structure' of the State concerned, under Art. 4 (2) TEU (Schnettger, 2020: 9). Since then, so called

[2] *BVerfG*, Judgment of the Second Senate, 5 May 2020 – 2 BvR 859/15, "PSPP".

'identitarian arguments' (Weiler & Lustig, 2018: 315) – whether reference to identity is made explicit – pose a serious threat to equality among Member States and citizens as enshrined in Arts. 4(2) and 9 TEU, respectively. Such arguments, in fact, take the form of a dilemma with no solution: if accepted, the State concerned will go exempt from the application of a Union law norm that other States must apply; if rejected, that norm would impair the fundamental structure of the State concerned while providing advantages, even conspicuous in reach and weight, to a number of others.

Yet, whether in a specific case the Union's normative claim prevails on, or yields to, the national one seems not only a difficult question to answer, but even a difficult one to ask. Despite the efforts of the *réseau judiciaire euro-unitaire* (Bailleux, 2009; see Sáiz Arnaiz, 2009: 379) conflicting normative claims find it uneasy to communicate with one another (Walker, 2012). The language they use differs radically (Jakab, 2016: 49). One speaks the words of priority in view of common goals and objectives; the other is moulded by the vocabulary of constitutional identity in defence of national sovereignty. One has to survive the erosion of its own narrative: the story of multiple common benefits that would have systematically followed the European integration has turned into fear (Weiler, 2012) which calls for a *Katechontic* power (Schmitt, 1950: 53; Cacciari, 2013: 44) to 'take care of the whole community'.[3] The other fights this idea by evoking memories of a Nation-State *grandeur*, whether real or forged, which mix national autonomy with an apology of State's supremacy bordering genuine nationalism (Tushnet & Bugarič, 2020). Both claims are prone to degenerate in a rejection of democratic self-government as the 'constitutional core' (Sarmiento Ramírez-Escudero, 2013: 77) of a Europe of *equals*; both may resuscitate the darkest legacies of the twentieth century (Joerges, 2003) due to their scarce *universalizability* (Poiares Maduro, 2003: 529); both ride the wave of the rampant, multi-faceted Euro-scepticism (Serricchio, Tsakatika & Quaglia, 2013) that has replaced the European constitutional hype (Millet, 2013: 69).

No surprise that the judicial dialogue, yet tenaciously pursued, is in trouble if demanded to unravel knots of such political magnitude (Faraguna, 2016: 491). The *BVerfG*'s judgment on the *PSPP* is the last and conclusive demonstration of a growing tension that has apparently led to a no-return point (Dani *et al.*, 2020).

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[3] "[*Lex est*] *quaedam ordinatio ad bonum commune, ab eo qui curam communitatis habet*" is a quote from Thomas Aquinas, *Summa Theologiae* (1274?) *Prima Secundae*, *Quaestio* 90, art. 4, at http://www.corpusthomisticum.org/sth2090.html [18 October 2020].

This article reads the now manifest European constitutional conflict to find early traces of a general legal principle – essentiality – whose potential in defending the constitutional balance of the Union may be worth to test. It is structured as follows. Paragraphs II and III recall the Union's path towards constitutionalisation by means of two concepts, diverse but germane with each other, which have perhaps received in the scholarship fewer attentions than they deserve. Paragraph IV illustrates the 'Maastricht model' of *Euro-unitary* constitutional balance and reads accordingly the arguments backing the European Monetary Union (EMU)'s compatibility with the German Basic Law (*Grundgesetz*, GG) as crafted in the Maastricht-*Urteil*. Paragraph V describes the shift towards a 'rescue under conditionality' that the 2008 crisis has triggered and detects a change in the arguments the *BVerfG* construes to back the EMU's constitutionality. Paragraph VI looks into the reasoning deployed by the Court of Justice in *Gauweiler* and *Weiss* to highlight the effects of that shift and accounts for the consequent *BVerfG*'s replies. Following this line, Paragraph VII points at the rise of essentiality – a concept and a legal principle aiming to defend the Euro-unitary constitutional balance attained in Maastricht – while Paragraph VIII offers a key to read the *PSPP* case. Eventually, conclusions (Para. IX) will be drawn to put the achievements of the work in the turbulent context of today's Union.

II. EARLY CONSTITUTIONALISATION: THE *PLANUNGSVERFASSUNG*

A thorough recall of the Union's constitutionalisation would be too big a feat for the scope of this work. Yet, it seems useful to account for the development of two concepts whose role in shaping the Union's evolution has perhaps been underrated.

The first concept was coined by a German jurist, international lawyer, and diplomat – Carl Friedrich Ophüls – at the dawn of the European Economic Community era. Ophüls began to call the Treaties *Planungsverfassungen*: *i.e.,* constitutions unfolding a plan that was already entirely in the mind of the Founding Fathers, and undertaken by the States themselves (Ophüls, 1965a: 229). Hence – he argued – in the interpretation of Community law, teleological arguments aiming at further integration were equivalent to 'original consent' arguments, as it was to be assumed that the original consent of the States invariably aimed at the progressive edification of an 'ever closer Union'.

This thesis was crucial in subverting the well-known (and hitherto dominant) *Lotus* doctrine,[4] according to which limitations to national sovereignty could not be presumed (Bin Cheng, 1953: 29). Thanks to the *Planungsverfassung* reasoning, such limitations came to be sustained by a nearly absolute presumption, for they allegedly corresponded to the original will of the contracting States (Ophüls, 1965b, 24).

At this juncture, a heated scholarly dispute arose between the advocates of the European project and the constitutional-international lawyers who were reluctant to unconditionally embrace the priority of the supranational norms. The most problematic point was that such a priority was inconsistent with the well-established 'juridical method' rooted in the German 'doctrine of the State' (Jellinek, 1880; Kerstens, 2000: 169 and Stolleis, 2004: 6) as re-interpreted mainly by Italian scholars (Itzcovich, 2006: 33; Caggiano, 2013: 441). In light of this method, the relations between national and international legal orders were to be given a 'monist', 'dualist' or 'intermediate' label, whereas the relation between national legislation and Community law (as a *species*, even *sui generis*, of international law) had to be construed accordingly (Sacchi Morsiani, 1965: 39; Miaja de la Muela, 1974: 987).

In a first stage (ranging from the end of the 60's to the end of the 70's) this dispute reached peaks of emphasis bordering lyricism (Catalano, 1966: 10; Gori, 1972: 186). The newcomers 'Community lawyers' contested the juridical method by underscoring the need to secure Community law's priority regardless of the theoretical approach undertaken, and they backed this point by arguments openly displaying a strong *pro*-European political bias (Gori, 1969: 198; Ribolzi, 1965: 41). An Italian legal philosopher captured this posture in a *jeu de mots* of kelsenian flavour: 'they confuse the "ought" with the "wish"' (Treves, 1969: 15). In their view, the fracture with the juridical method was not to be explained but first practised 'in order to get things done, in conformity with the teaching of the Court of Justice' (Catalano, 1964: 153).

This clash was particularly tough in Italy, where the enthusiasm for the European project coupled with a profound international 'fascination' of the 'progressive' élite and created a robust pro-Europe class of jurists, bureaucrats, and clerks from whose side the 'method's purists' were harshly accused of genuflection before the 'fetish' of national sovereignty (Ribolzi, 1964: 29). But it was a European-wide struggle, with remarkable consequences on a large scale (Bickerton, 2012: 21); and, clearly, a purely political one. Yet, all

[4] Permanent Court of International Justice, *S.S. Lotus* (*France* v *Turkey*) 1927, A-10 (7 Sept.), p. 18.

such arguments, yet passionately deployed by ingenious minds, were not solid enough to dismantle the structure of national constitutional systems. Another conceptual tool was needed to circumvent the remaining asperities and deliver the result of a European constitutional integration through law.

III. CONSTITUTIONAL RIPENESS: THE *WANDEL-VERFASSUNG*

Then, in the late '70's, a concept germane with the *Planungsverfassung* and corollary to it on the constitutional side began to operate in the backstage of the integration. While recognising its 'functional-teleological bases' (Ipsen, 1972: 196; Joerges, 1996: 8) the German jurist Hans-Peter Ipsen called the Community's constitutionalisation a '*Wandel-verfassung*', 'constitution in change' (Ipsen, 1983: 50-51).

The peculiarity of this concept lies in its overlapping, and provocatively echoing, the well-established but slightly different concept of constitutional change (*Verfassungswandlung*: Hsü Dau-Lin, 1932: 19; Mortati, 1998: 53). By virtue of this conceptual overlap, the evolution of existing national constitutions and the blossoming of a new European (non-)constitution were portrayed as two sides of the same coin – hence, credited with identical legitimacy. The idea behind this theory was that both processes originated from certain values shared by all Member States, which pointed to the rise of *common constitutional traditions* (Fichera & Pollicino, 2019: 1097). The Community's constitutionalisation was being achieved as the outcome of a manifold, converging process of constitutional change involving the States (Muñoz Machado, 1993: 59) and the supranational construct at once.

Building on this construction, a *Euro-constitutional thesis* rapidly arose: The Community integration was being attained, yet among sovereign States, by means of general principles of Community law stemming from common constitutional traditions grounded on shared values (von Bogdandy, 2000: 27; Stone Sweet & Brunell, 2004: 45); hence, a sort of *unconditioned primacy* of Community law as interpreted by the Court of Justice was arguably inferred.

However, national constitutional courts – especially in Germany and Italy – have re-arranged this thesis and mitigated its consequences by opposing certain conditions to the EU's constitutionalisation. Particularly, such conditions are enshrined in *Solange II*:[5] constitutional integration was held acceptable *so long as* Community law recognised 'equivalent standards

[5] *BVerfG* 73, 339 – Judgment of 22 October 1986 – 2 BvR 197/83, "*Solange II*".

of protection' in the area of fundamental rights to be applied by the Court of Justice (Kokott, 1997: 77).

As a consequence, the operability of the common values as a driver of a constitution-making process (Lenaerts, 2014: 135) must be so effective as to reduce political contrasts (including those affecting the sensitive fundamental rights' areas) to simple legal disputes – *i.e.*, disputes for which a solution can be found within the framework of the multi-level judicial circuit solely. 'So long as' this 'neutralisation' occurs, the Community's constitutional nature is rightfully asserted; and this results in the priority of Community law on national laws – even of a constitutional rank, as it was the case in the *Solange* case.

Hence, behind the Community's constitutionalisation laid an assumption that, relying on a pertinent scholarly definition, can be called *irenic*, conciliatory, as opposite to *polemic*, conflictive (Luciani, 2006: 1644). This assumption reads as follows: being the Community a community of States bound to respect each other's equal sovereignty despite their obvious differences in size and power, a norm hurting politically sensitive interests of any State should not apply until a suitable solution is sought by means of negotiations based on sincere cooperation. This would 'neutralise' political conflicts to an extent that courts are able to cope with.

This is why the European constitutional integration through law is, since the very beginning, tied to fair mutual cooperation on the political side. Absent such cooperation, no judicial circuit would be able to deal with too acute political conflicts, and the constitutionalisation based on common values would not suffice to support the Community law's priority claim. Fair cooperation, in sum, was and remains conditional for Member States to subscribe to an 'ever closer Union', *i.e.,* to the political integration programme backed by Community law's priority. Still, this balance rests on nothing more solid than a political agreement: pursuant to the marginalisation of the unanimity criterion in the Council's voting procedures, it relies on a simple diplomatic duty (Grimm, 2017: 144).

This subtle equilibrium is famously accounted for by the trio '*Exit*, *Voice* & *Loyalty*' that Weiler (1991: 2403) borrows from Hirschman (1970: 19) in his iconic description of the *Transformation of Europe*. In this line, *Exit* acts as a *Grenzbegriff*[6] whose shadow offers shelter to rights of *Voice* to be granted as a condition for enhanced *Loyalty*.[7] Such rights – rights to self-government within the Community – allow Member States to retain equal sovereignty

6 In Kantian terms, a boundary-concept, "limit-concept"; see Waibl & Herdina (1997: 42).

7 On "Loyalty" as "Federal Fidelity" see Klamert (2014: 47).

despite their differences while staying tied to one another in a single constitutional compound.

IV. THE 'MAASTRICHT MODEL' AND THE *GRUNDGESETZ*: A EURO-UNITARY CONSTITUTIONAL BALANCE

The constitutional journey described hitherto leads to the Maastricht Treaty, whose Art. F provides as follows:

> 1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The new-born European Union rests on two branches: national sovereignty exercised on equal footing by democratic self-government and equivalent standards based on common constitutional traditions, including the ECHR, to protect fundamental rights (Panunzio, 2005: 30; Rodríguez Iglesias & del Valle Gálvez, 1997: 239). In fact, such provisions reflect the balance achieved by the *Planungs-* and *Wandel-verfassung* concepts and enshrined in the Hirschman-Weiler formula. Point 1) refers to fair cooperation: should any Community law norm hurt sensitive interests of any Member State, that norm would not apply. As a corollary, 'national identity' looks 'Europeanised' (Ruggeri, 2001; von Bogdandy, 2005: 295): while deference is paid to the States' equal sovereignty based on democratic self-government, political conflicts are assumedly neutralised and dragged to the adjudication plane. Accordingly, Point 2 refers to the *Solange II* doctrine: fundamental rights in Member States are respected so long as Community law protects such rights by equivalent standards based on common constitutional traditions (Gordillo Pérez, 2012: 41).

This constitutional paradigm may be called the 'Maastricht model'. As originating from the combined action of the *Planungs-* and the *Wandel-verfassung* concepts, it embraces both the Union and each Member State in view of an 'ever closer Union', and sets the conditions required for the European constitutional process to support the EU law's priority. Fulcrum of the model is a *correspondence* between political sovereignty and judicial protection of

rights: on an equal footing, all Member States are entitled to democratically decide about the content of the rights they recognise at both the domestic and the supranational levels.

In light of this picture, the *BVerfG*'s arguments deployed in the Maastricht-*Urteil* to maintain the EMU's compatibility with the *Grundgesetz* may be summarised in two points:

A) Germany enters EMU as a sovereign State; thus, the *Bundestag* retains the right to prevent any EMU's development whose effect would hurt what the Government and the Parliament itself – according to national constitutional arrangements – identify as a sensitive national interest.
B) By virtue of Art. 88(2) GG, both the German and the European Central Banks rely on ordoliberal principles: they have an identical structural philosophy – independence *vis-à-vis* political organs – an identical task (monetary policy) and an identical purpose, *i.e.*, keeping price stability. Hence, this scheme is taken as the best standard to protect the right to property (Art. 14 GG) both at the German and European level and is covered by the Eternity Clause (*Ewigkeitsklausel*) which restrains national constitutional reform under Art. 79(3) GG.

In this line, a parallelism emerges between the 'Maastricht model' and the points raised by the *BVerfG* to account for the EMU's constitutionality.

Point A) matches Point 1): by virtue of the sincere cooperation principle, the German Parliament, as well as any other national parliament, can *de facto* veto those measures developing and implementing EMU to the detriment of sensitive national interests as settled by democratic (parliamentary) self-government.

Point B) matches Point 2): the ordoliberal approach (Art. 88(2) GG) is the best way to protect property in Germany (Art. 14 GG) as far as the sovereign Parliament's decision is concerned and, at the same time, amounts to the 'equivalent standard' that the Maastricht Treaty, in line with *Solange II*, requires for the EU to respect fundamental rights.

Consequently, albeit a critical reading of the Maastricht-*Urteil* highlights the EMU's ordoliberal irrevocable commitment (Joerges, 1997: 1; Weiler, 1994: 203) – which would bind all the Member States, including Germany, unless the *Grundgesetz* is amended or repealed by another constitution – a more nuanced picture emerges once the judgment is looked at in the context of the Maastricht constitutional balance, which anchors the judgment to a thorough defence of parliamentary democracy (Kirchhof,

1993: 64). Such a contextual perspective has an influence on the *BverfG* subsequent case-law, as the ordoliberal commitment is nowhere cited as an 'absolute' postulate. A twofold passage of a 1998 *BVerfG*'s judgment is significant in this regard: "[a]rt. 88, second sentence, Basic Law expresses the constitutional legislator's will to accept the transfer of the German *Bundesbank*'s tasks and powers to a European Central Bank on condition that the European Central Bank be independent and committed to the priority goal of guaranteeing price stability".[8]

The first line displays the link between the ordoliberal approach undertaken by Germany – a sovereign State whose government responds to principles of democratic self-government – and the EU. This match looks like an *aut-aut*: either the EMU is ordoliberal as Germany is or it would be unconstitutional for Germany to participate until the *Grundgesetz* is amended or replaced by a new constitution. But the follow-up significantly corrects this impression: "[the ordoliberal approach encompasses] … Community law and the law of other Member States. In relation to other Member States, it will at any rate primarily be met through political agreement".[9]

It seems safe to argue that the *BVerfG*, yet forcefully restrained to a merely domestic perspective, takes into account the constitutional coordinates of the Treaty on whose constitutionality it is called on to decide. Therefore, the EMU's commitment to ordoliberalism unveils the link with a 'political agreement' to be reached at both national and EU level: such agreement comprises all Member States and leaves them free, on an equal footing with Germany, to democratically decide on the content of the rights they recognise – including the right to property, which ordoliberalism allegedly protects by 'equivalent standards' for all States.

Following this path, it seems rightful to argue that, in the reasoning offered by the German Court, the EMU's ordoliberal commitment is consistent with the constitutional yardstick set in Maastricht; and this is so because it is *presumptively* regarded as the *best standard* for all Member States to protect the right to property in a manner equivalent to what they would do at home by a free democratic decision.

Thus, the thesis suggested hereby can be formulated as follows: the *BVerfG* assumes that, by signing and ratifying the Maastricht Treaty, all Member States have accorded to the ordoliberalism-committed EMU (the so called *Stabilitätsgemeinschaft*) a *presumption of conformity* with the 'Maastricht model' – *i.e.*, a presumption of consistency with equivalent standards

8 *BVerfG*, Judgment of the Second Senate, 31 March 1998 - 2 BvR 1877/97, 89.
9 *Ibid.*, 96.

for the protection of fundamental rights as set for by national democratic self-government. Such presumption covers all its provisions, as well as the developments and implementations carried out on the basis thereof; which is in line, as it is easy detectable, with the irenic assumption underlying the EU's constitutionalisation.

Also, if one inverts the elements of this reasoning to look at the Maastricht constitutional balance through the lens of the EMU's ordoliberal approach, the outcome stays the same, which furtherly backs the suggested thesis.

As a matter of fact, the Maastricht Treaty draws a line between economic and monetary policies that fully relies on ordoliberal doctrines: the former is 'political' (and it is for the Member States to shape it according to national political will: Everling, 1992: 1053) whereas the latter is 'technical' – thus, it must be conferred on independent bodies that possess the appropriate expertise to deal with the issues concerned. Consequently, in the EMU's original account, monetary policy is by default *neutralised*, 'un-political' (Hadjiemmanuil, 2001: 131; see Dawson, Maricut-Akbik & Bobić, 2019: 75) – thus, no national sensitive interests can be hurt as a result of the activities carried out by the 'technical' bodies endowed with the relevant powers (Joerges, 2015: 994).

In this line, the matches between this approach and the 'Maastricht model' become easily detectable. Monetary policy is by definition 'un-political': it suits both Points 1) and A), because, by definition, it can hurt no sensitive interest of any Member State and, should it do so, all Member States *de facto* could veto it under the fair cooperation duty. Ordoliberalism is then presumptively regarded as the 'equivalent standard' to protect monetary property in a German *and* European context at once, in line with Points 2) and B).

At this juncture, the reasons why the Eternity Clause is called into question in relation to Art. 88(2) GG may benefit from a refreshed reading.

The Clause covers the foundations of self-determination and protection of rights: 'the division of the Federation into *Länder*, their participation in principle in the legislative process… [and] the principles laid down in Arts. 1 [inviolability of human dignity] and 20 [sovereignty of the people]' (Dreier, 2015: 2025). If all these elements are read in light of the *BVerfG*'s case law on human dignity,[10] a link emerges between the protection of the latter as

[10] As for the relation between dignity and self-determination, *BVerfG*, Judgment of the Second Senate, 26 February 2020 – 2 BvR 2347/15, on assisted suicide; see also the renowned judgment on the *Flight Safety* (*BVerfG*, Judgment of the First Senate, 15 February 2006 - 1 BvR 357/05) whose paragraph 121 reads as follows: "… it is part

foundational to defending fundamental rights and the self-determination of free human beings as individuals and members of the society (Häberle, 1972: 46). This link may be roughly described as follows: it is for the people's sovereignty, through the ways provided for by the *Grundgesetz*, to determine the content of the rights that Germany recognises as fundamental (Möllers, 2013: 51). In this line, the substantive profile – the material rights protected – and the procedural profile of human dignity – *i.e.*, the self-determination, individual and collective, of free women and free men – would be in perfect balance with each other.[11]

If this sophisticated construction is transplanted into the constitutional framework set in Maastricht, the same link is discernible, the European integration adding just one more layer to the relation between individual and collective self-determination. Therefore, it is not Art. 88(2) *as such* what the Clause aims to defend, but the relation between Arts. 88(2) (ordoliberal approach) and 14 (monetary property) with Art. 20 (people's sovereignty) and Art. 1 (human dignity) in light of Art. 23 GG (European integration; Wollenschläger, 2015: 436). To put it shortly: in the *BVerfG*'s view, the Eternity Clause and the Maastricht model enshrine the same constitutional key, *i.e.,* the link between self-determination and protection of rights, which embraces Germany *and* the EU so long as Germany is a EU Member State. The Clause does not protect a pre-established substantive constitutional content, but the relation between such content and the right to *Voice* in the determination thereof, absent which no *Loyalty* to the norm concerned can be demanded; and it does so at both national and European levels, in line with the presumption erected along the EU's constitutionalisation. If understood in this vein, what the Clause protects can be described as *the substantive content of people's sovereignty*: it is for the people, throughout the ways provided for in the constitution, to decide by themselves on the content of the rights to be protected – and this must be the case for Germany *and* for the EU as long as Germany holds membership in the EU.

Under this perspective, one is led to presumptively assume that ordoliberalism has been settled by a sovereign, free, and democratic decision of

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of the nature of human beings to exercise self-determination in freedom and to freely develop themselves, and that the individual can claim, in principle, to be recognised in society as a member with equal rights and with a value of his or her own… the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state".

[11] McCrudden (2008: 655), finds that the use of dignity has paved the way to 'significant judicial manipulation' thus to 'increasing rather than decreasing judicial discretion'; this balance might lessen the effects he warns of.

all Member States on an equal footing as the best standard for equivalent protection of the fundamental right to property. This is why the Eternity Clause regards ordoliberalism as constitutionally binding on German lawmakers; were it abruptly abandoned, the sovereign, free and democratic decision that Germany has taken on an equal footing with the other States would be reversed without consistent democratic support, which would certify Germany's lack of *Voice* in determining the content of the law for which *Loyalty* is demanded. This passage – not a departure from ordoliberalism as such – would be contrary to the most solid constitutional anchorage that Germany shares with the EU. Furthermore, one may reasonably contend, it would be contrary not only to Germany's constitutional law, but to the constitutional law of all the other Member States as long as they participate in the EU, should they be demanded *Loyalty* to a norm whose content they have had no *Voice* in determining.

Consequently, in line with the constitutional thesis, the 'Maastricht model' should be seen as the paradigm of a *Euro-unitary* constitutional balance: a balance in which the European *constitution* and any national constitution are inextricably entangled, a violation of the latter – as regards equal national sovereignty exercised by democratic self-government and defense of fundamental rights by equivalent standards – resulting in a violation of the former. More specifically, this balance rests on the common value of human dignity, understood – in broad, yet normative terms (López Castillo, 2017: 369) – as the ground for individual and collective self-determination of free women and free men who fill in the content of the rights that they are recognised by public powers. Hence, this conception acquires a fully-fledged recognition as part of the constitutional traditions common to the EU Member States.

This conclusion leads to a somehow paradoxical but unavoidable corollary: by opposing certain EMU's normative developments as incompatible with the Eternity Clause, the *BVerfG* stands in defence of the constitutional balance reached in Maastricht. In other words: The Karlsruhe judges, when acting to preserve Germany's sovereignty, make arguments to defend each Member State's national sovereignty (to be exercised on an equal footing by democratic self-government) should the duty of fair cooperation turn unprofitable. In this view, they enforce the German constitution *and* the Maastricht model at once: they do not operate as the German Constitutional Tribunal only, but as a *European* constitutional court (Komárek, 2014: 525; Azpitarte Sánchez, 2016: 941).

This somehow *counterintuitive* consideration becomes credible as the line of reasoning displayed in the evolution of the EMU-related *BVerfG*'s case-law seems to define a general principle of EU law that stems precisely from the alleged common constitutional traditions (Vosa, 2020: 204). Early

traits of this principle, which may be called 'essentiality', surface as much as the constitutional drift caused by the 2008 crisis disrupts the balance attained by the 'Maastricht model'.

V. AT THE DAWN OF THE CRISIS: THE *BVERFG* BEYOND THE 'MAASTRICHT MODEL'

Whereas the Lisbon Treaty does not revoke the conditions set in Maastricht (Besselink, 2010: 36; Guastaferro, 2012: 263) – rather, it gives reasons to argue that, should the EU's constitutional balance be unsettled, Member States could oppose the EU law's priority (von Bogdandy & Schill, 2011: 1417) – the European Council meeting celebrated in Brussels on 11-12 December 2008 signposts the beginning of the EU's constitutional turmoil. A narrative of *global* crisis for which political responsibility is argued virtually non-existent displays at Point 5 of the *Conclusions* concerned.[12] Institutions and procedures are made instrumental to the normative outcomes agreed upon in Washington, as the very *Conclusions* explain.[13] The 'secular triptych' (Craig, 2014: 19) designed to fight the crisis is created pursuant to a 'consensus' that admittedly works as an *external*, yet irresistible *constraint* placed on the ordinary EU's law-making.

The *BVerfG* is confronted with this new scenario some years later, in a case concerning the ESM Treaty's constitutionality.[14] As an international agreement ancillary to the EMU, the ESM would theoretically enjoy the same presumption that supports the compatibility of the EMU's development with the Maastricht model. Signs of discomfort, though, are well-visible in the reasoning and reveal the *BVerfG*'s awareness of the perturbing innovations that are being introduced (Calliess, 2013: 402).

The German judges start by a twofold general assumption: 1) EMU is a *Stabilitätsgemeinschaft*, this being crucial for Germany to be part to it; 2) monetary policy being unpolitical, an independent European Central Bank (ECB) may not enter the realm of economic policy, let alone finance a Member State's bailout.[15] 'In this context' – they continue – the ban on monetary financing is an essential element (*wesentliches Element*) under the

12 At: https://bit.ly/2Oh1eKF.

13 *Ibid.*, Point 6.

14 *BVerfG*, Judgment of the Second Senate, 12 September 2012 – 2 BvR 1390/12, "ESM".

15 *Ibid.*, 115.

Eternity Clause.[16] 'That context' arguably ties the ordoliberal commitment enshrined in the cited assumption to another assumption, namely that the Maastricht model is still in force. This point is made clearer by the fact that the 'essential basis' for Germany's participation in EMU does not rely on Art. 88(2) solely, but displays a relational dimension pointing to the link between Arts. 88(2) and 14 GG. In other terms: The Eternity Clause does not protect the ban on monetary financing *as such* but the relationship between the ordoliberal commitment and the protection of the fundamental right to property, which underpins the ban on monetary financing.[17]

There is room to confirm that, under German constitutional law, the EMU's commitment to ordoliberal principles is *not* an absolute one; it just *looks* absolute as ordoliberalism is presumed to be the best standard for Germany and for all Member States to protect the fundamental rights of their citizens by means of democratic self-government. As far as the context suggests, the Clause does not cover that ban 'as such' but only to the extent that the presumption leading to the EMU's ordoliberal commitment works well; and it operates not only in a German but in a Euro-unitary perspective.

The slight but far from insignificant switch in the *BVerfG*'s approach has a notable consequence: it gives space to argue that the presumption holding the EMU's ordoliberal commitment, yet still standing, admits evidence to the contrary. The ESM Treaty – duly ratified by the German Government, among others – still enjoys a presumptive consistency with the Maastricht constitutional balance and the conditions set therein do presumptively amount to a coherent development of the 'Maastricht model'. Nonetheless, the German Court paves the way to further constitutional arrangements that may lead to abandoning the ordoliberal orthodoxy if such a turn were 'democratically legitimised'.[18] A further passage is telling in this regard: as the *BVerfG* puts it, Art. 79(3) GG does not cover all 'manifestations' (*Ausprägungen*) of the *Stabilitätsgemeinschaft*.[19] There would certainly be other such 'manifestations' compatible with the *Grundgesetz* that could be introduced pursuant to a decision backed by adequate political-democratic support.

Arguably, the locution 'new manifestations of the stability community' should be read as 'arrangements that may depart from the pure ordoliberal pattern the EMU is committed to'. Despite the rigidity of its conceptual

16 *Ibid.*, 116.
17 *Ibid.*, 115.
18 *Ibid.*, 117.
19 *Id.*

schemes, the *BVerfG* makes an argumentative effort to unravel the link between Arts. 88(2) and 14 GG as the *actual* essential element for Germany to take part in the EMU. Confirmedly, the EMU's commitment to ordoliberal principles is not absolute: what must be preserved is the link between people's sovereignty and protection of rights. Then, if a legal act based on the former decides, in light of a political agreement reached at both German and European level, that the ordoliberal approach is no longer the best equivalent standard to secure the latter, a departure from the ordoliberal orthodoxy at the EU level is compatible with the *Grundgesetz* as long as that act can find adequate political-democratic support.

From this picture, a broader idea may be construed and phrased as follows. Binding norms cannot go *too* far from what could have been grounded on their respective legal bases – the provisions that work as law-making mandates to produce such norms – in light of the initial consent; if they do, new pieces of positive law must be adopted to tie these norms to new expressions of the sovereign people's will – such pieces serving as *adequate* legal bases for the norms whose binding effects are sought.

This idea – norms which go *too* far from the initial mandate require a renewed, *adequate* legal basis to strengthen their link with the people's sovereignty – seemingly contains the actual 'essential element' (*wesentliches Element*) that Germany must respect in order not to violate the *Grundgesetz* by participating in EMU.

Early traits of this idea – that may be called 'essentiality' – emerge in *BVerfG*'s lines such as the following one: "… [i]f the monetary union cannot be achieved in its original structure through the valid integration programme, new political decisions are needed as to how to proceed further… It is for the legislature to decide how possible weaknesses of the monetary union are to be counteracted by amending European Union law".[20]

Thus, a departure from the moorings of orthodox *Stabilitätsgemeinschaft* is possible should the political bodies responsible for the integration realize that the conditions underpinning the 'Maastricht model' are no longer met, and that such a change is required. The *BVerfG* keeps silent as for the extent of this change: the essentiality idea comes with broad margins of flexibility, as revealed by expressions such as 'go too far' and 'adequate legal basis' one needs to use to explain it. This is why the Karlsruhe judges do not anticipate what kind of amendment to EU law is exactly required to provide adequate legal basis to new *Stabilitätsgemeinschaft* manifestations (if a Treaty amendment, or others); likewise, they do not *ex ante* impose a

[20] *Ibid.*, 118.

constitutional amendment, or a brand-new constitution, to back such a change on the national side. Nevertheless, they sketch out a criterion that, yet vague in content, gives indications in this respect. The formal rank and substantive content of the amendment must be considered in relation to the effects sought: they have to be commensurate to the obligations that Germany would come to undertake, particularly to their '*fundamental legal reversibility*'.[21] In light of this criterion, the German Court highlights that, should 'essential budgetary decisions' ('*wesentlicher haushaltspolitischer Entscheidungen*') be permanently conferred on supranational bodies, the substantive content of the people's sovereignty would be permanently undermined, and that would be forbidden by Art. 79(3) GG – to be sure: not that conferral *as such*, but that conferral as *too distant* from the initial constitutional mandate that national bodies must respect, as they received it by the sovereign people.

The *relational* nature of the essentiality's conceptual background can be better grasped by a comparison with the *Wesentlichkeitstheorie* (theory of essentiality)[22] developed in the *BVerfG*'s case-law on the *reserve de loi* (*Vorbehalt des Gesetzes*).[23] Accordingly, 'essential decisions'[24] ('*wesentliche Entscheidungen*') can be taken by the legislature only. Most notably, they are *not* forbidden *as such*; rather, they simply cannot be taken by administrative organs but must be referred to the political body credited with a general political representative function, and such a reference must result from a legislative act possessing sufficient *normative density* (*Regelungsdichte*: Staupe, 1986: 103) so as to fulfil the requirements laid down in Art. 80 GG.[25]

This idea becomes a legal concept as further developments of the 'EU law of the crisis' manifestly undermine the Maastricht model. As the mandate laid down in the Treaties proves insufficient to back laws that seriously derogate from the Maastricht constitutional balance, essentiality is deployed against the priority claimed by measures adopted on the basis of such derogations. Then, the paradox of a German Constitutional Court

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21 *Ibid.*, 119.

22 This insight only very rarely appears in the relevant literature: see Steinbach (2010: 381) and Mindus & Goldoni (2012: 351).

23 A comprehensive 'essentiality doctrine' was delineated by the Karlsruhe Court in a case concerning the edification and management of nuclear power plants (*BVerfG* 49, 89 – *Kalkar I*, 8 August 1978). See Kloepfer (1984: 685); Ossenbühl (2007: 183); Fois (2010: 211).

24 *BVerfG* 49, 89 – *Kalkar I*, 76.

25 See also Böckenförde (1981: 126) and Badura (1992: 165) for a broader account of the theory's constitutional context.

prone to defend Europe's constitutional balance by countering the alleged 'pro-Europe' measures of 'solidarity' appears in a clearer fashion: when it declares that some EU law measures are unconstitutional for Germany because they violate the ban on monetary financing, the *BVerfG* actually opposes the whole *raison d'être* underpinning the EU law of the crisis, and exposes derogations from the Maastricht model that seriously threaten the Euro-unitary constitutional balance as a whole. What the *BVerfG* defends can be formulated in one sentence: it is up to the sovereign people(s) to decide on the content of the rights to be recognized by public authorities. Should such content be determined by decisions taken *elsewhere*, out of reach of the people(s)' sovereignty, the consequent rights would not be recognized but 'conceded' – *octroyés*, *otorgados*, *elargiti* – by public authorities whose conduct remains unquestionable.

To put it more clearly: when the *BVerfG* contends that the norms adopted as EMU's developments or implementations violate the ban on monetary financing and are unconstitutional for Germany, it does not refer to Germany as such, but to Germany as a EMU (EU) Member State, and the yardstick of such an unconstitutionality is not the *Grundgesetz* as such, but the Euro-unitary constitutional parameter built up in Maastricht as a result of the *Planungs-* and *Wandel-verfassung* joint action. Consequently, the arguments offered are *universalisable*: all Member States can use them if their equal sovereignty, or the equivalent standard for protection of their citizens' rights, is disregarded by a piece of EU law – and they could do so both in their mutual relationships and *vis-à-vis* the EU institutions.

VI. 'RESCUE UNDER CONDITIONALITY' AND ITS DISCONTENTS

For counterintuitive it may appear, the *Euro-unitary* scope of essentiality finds confirmation in the long-lasting struggle that still involves the *BVerfG* and the ECB. A quick recall of the coordinates thereof helps understand why.

It seems that the law adopted in response to the crisis – also dubbed *Ersatzunionsrecht* (Lorz & Sauer, 2012: 573) – disrupts the constitutional balance settled in Maastricht. Three points can be adduced in this regard.

First, the *Europeanist* narrative of common benefits is virtually overturned. The painful inequalities among States and citizens are justified on the basis of a tenacious refrain blaming the debtor States' citizens for a *sin* of *moral hazard* (Steiner *et al.*, 2013: 1) *i.e.* for 'living beyond their possibilities' (Kaupa, 2017: 32).

Second, a constitutional mutation lies in the distortion of the Hirschman-Weiler formula: as commensurate rights to *Voice* are denied in the face of enhanced demands for *Loyalty*, *Exit* ceases to be a *Grenzbegriff* and turns an actual policy option – a non-equal one, though: ready to be deployed as a menace before Greece (López Pina, 2016: 57) but also available as a radical exercise of sovereignty in the case of *Brexit* (Wilkinson, 2017: 20).

Third, Union law is affected by tensions that are visible at multiple stages.

On a *horizontal*, supranational plane, the Treaties are *interpreted*, so to say, to shield operations such as monetary financing of Member States from incompatibility with EU law (Beck, 2013: 635)[26] despite the *no-bailout rule* laid down in Art. 125(1) TFEU (Steinbach, 2016: 361).

On a *vertical*, EU-States plane, the alteration is twofold.

On the side of the 'creditor States', taxpayers are forced to throw money in the multifaceted galaxy of the rescue funds. Eventually, they must accept substantive limitations to budgetary sovereignty, as it becomes clear that the money lent will hardly be repaid but will only serve for those States to contract further debt. While affecting the principle of conferral, this trade-off impairs the link between national democratic self-government and protection of rights by equivalent standards that underpins the Maastricht model.

On the side of the 'debtor States', official *conditionalities* provided by *Memoranda* of Understanding, (along with non-official ones contained in the 'letters' the ECB management discreetly sent to national Governments) symmetrically restrained budgetary sovereignty with suspect repercussions on the principle of conferral (Adamski, 2019: 25). This, too, results in breach of the Maastricht model, as far as the link between national democratic self-government and protection of rights by equivalent standards is concerned.

In sum: the 'rescue under conditionality' is a *political* replacement for the Maastricht model – a product of the Washington meetings abovementioned in all likelihood – but it is hardly consistent with it from a legal-constitutional viewpoint.

No doubt then: confronted with the *OMT* case, the *BVerfG* and the Court of Justice were caught in an awkward situation (Goldmann, 2015: 265). On one hand, OMT were presented as EMU developments aiming at price stability in the framework of the monetary policy objectives – hence, in line with the Maastricht model and presumptively compatible with the *Grundgesetz* (Bast, 2014: 172). Nonetheless, on the other hand, they looked *prima facie* incompatible with that model: they affected economic policy and

[26] Such an *interpretation* comes along with a substantive distortion in meaning of key constitutional concepts: see Menéndez (2017: 56).

overturned the *no-bailout* rule, whereas the ECB by definition acts within the boundaries of monetary policy and never acts in favour of certain Member States only (Menéndez, 2012: 58; Kilpatrick, 2018: 70).

As a consequence, the question both courts have been confronted with has no solution under Maastricht-based rules. If OMT belong to economic policy, then the ECB exceeds the boundaries of monetary policy in pursuing what it deems to be, in its independence, the right way to pursue the objectives laid down in the Treaty (Hinarejos, 2015: 563); this disavows both the ECB's independence and the economic-monetary policy divide as regards the Union's competences, which would attest to the model's demise. But, if they amount to monetary policy, monetary policy turns *political* (Buffoni, 2016: 21): the ECB, in keeping price stability, would disregard the *no-bailout* rule to selectively sustain certain Member States only. This, too, certifies the model as untenable: the collapse of the irenic assumption would expose the link between democratic self-government and protection of rights to uncontrolled political pressures, fair mutual cooperation turning impracticable (Joerges, 2016: 99; Steinbach, 2019: 1354).

The Court of Justice chose to declare OMT at the same time a programme of monetary policy *and* one that was compatible with the *no-bailout* rule; yet, maybe, it could have given further reasons for the *BVerfG* to conclude that no unsettlement of the Maastricht constitutional balance was eventually entailed. Instead, *Gauweiler* looks infused with ill-concealed deference toward the 'competent' law-makers (Menéndez, 2019: 299) and the rather assertive, laconic tone does not offer guidelines for a comprehensive understanding of the constitutional *equilibria* at stake. A confirmed fact – OMT affect economic policy – is subordinated to the ECB's reading of its own mandate: "… A monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area".[27]

This line of reasoning leads to a threefold manipulation of proportionality. First: object of the scrutiny is not the conferral (as Art. 5(4) TEU states) but directly the OMT programme, the conferral knot being left entangled. Second: the range of the scrutiny is admittedly restricted to manifest errors, as the ECB and its 'System' must be recognized a broad margin of discretion in light of the difficult technical evaluations and complex predictions they must perform.[28] Third, the Court purposely takes into no account the *dissent* OMT generate:

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[27] ECJ, Case C-62/14, *Gauweiler*, 16 June 2016, ECLI:EU:C:2015:400, par. 52.

[28] *Ibid*., 68; see Mendes (2017: 443).

> "… the fact, mentioned by the referring court, that that reasoned analysis has been subject to challenge does not, in itself, suffice to call that conclusion into question, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy".[29]

Monetary policy turns political: the ECB as an independent body favours some interests to the detriment of others. Worth to note that, in the preliminary question the *BVerfG* explicitly brought the conflictive nature of the ECB's decisions, as evidence for their potential unconstitutionality;[30] the Court of Justice explicitly rejects it but gives little reasons for.

This is the ringing bell for the *BVerfG*: the *rescue under conditionality* paradigm stays in no line with the Maastricht model and undermines the constitutional balance Germany is part of. This awareness brings about a shift in the constitutional arguments underpinning Germany's participation in EMU: the *BVerfG*, though striving to keep itself aligned with previous case-law, offers a renewed arrangement of the constitutional parameters required for the EMU to be compatible with the *Grundgesetz*.

The relationship between Arts. 88(2) and 14 GG looks anew in *OMT-II*: the link between the *Stabilitätsgemeinschaft* and the protection of monetary property as a fundamental right is overturned, and this is held mandatory under Art. 79(3) GG – the same Eternity Clause that once allegedly protected the ordoliberal orthodoxy. The then presumptive correspondence between the ordoliberal approach and the protection of property as a fundamental right whose content is decided by the people's sovereignty looks upside down: for Germany to take part in EMU, the *Grundgesetz* requires "…that the monetary policy mandate of the European Central Bank be interpreted restrictively and that its observance be subject to strict judicial review in order to at least limit the decrease in the level of democratic legitimation of the Bank's actions to what is absolutely necessary".[31]

In other words: the ECB's independence, core of the ordoliberal approach, *must be questioned* to the extent that it threats the 'essential element' covered by Art. 79(3) GG. It seems now clear that this element does not coincide with the ordoliberal approach but with the essentiality concept: norms that go *too*

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29 ECJ, *Gauweiler*, cit., 75.

30 *BVerfG*, Order of the Second Senate, 14 January 2014 – 2 BvR 2728, 2729, 2730, 2731/13, 2 BvE 13/13, "OMT". See Wilkinson, 2015: 1053.

31 *BVerfG*, Judgment of the Second Senate, 21 June 2016 - 2 BvR 2728/13, "OMT-II", 189.

far from the original mandate require an *adequate* legal basis to have their link with the people's sovereignty adequately strengthened. The Karlsruhe Court finds that the ECB's mandate is being stretched *too much* in relation to the political sensitivity of the norms the ECB seeks to adopt on the basis of that mandate and urges the bodies responsible for the EU integration to consider new 'manifestations' of the *Stabilitätsgemeinschaft* – something that, as abovementioned, was already envisaged in the ESM judgment as a possible consequence of the EMU's developments.[32]

VII. THE DEVELOPMENT OF ESSENTIALITY

At this point, it is worth noting that essentiality takes a better-defined conceptual shape as it is made explicit that the Eternity Clause does not cover the *Stabilitätsgemeinschaft* as such. While questioning the orthodox ordoliberal pattern, the *BVerfG* construes a more robust account of the essentiality argument. Point of departure is the substantive content of the people's sovereignty: in line with earlier case-law related to anti-crisis measures[33] a magniloquent, fully-fledged constitutional right is phrased as the 'substantive content of the right to vote' whose anchorage lies in the juncture between Arts. 38(1) and 1 *Grundgesetz*.[34] The link with the 'untouchable' dignity as free self-determination, individual and collective, of human persons definitively points to the *universalisable* nature of essentiality; should it operate for persons of certain Member States only, then those persons would be recognised a 'superior' dignity as members of a certain Nation-based group, ethnicity or the like – which would tie that argument to some well-known theoretical constructs that the Union has explicitly repudiated for good.[35]

The background of the essentiality argument is phrased in two passages, which outline the 'substantive content of the right to vote'.

First: the *BVerfG* holds that all EU legal acts must have a 'sufficient degree of democratic legitimation' (*ein hinreichendes Maß an demokratischer*

[32] *BVerfG*, "ESM", *cit*., 117.

[33] *BVerfG*, Judgment of the Second Senate, 7 September 2011 – 2 BvR 987/10, 120.

[34] *BVerfG*, "OMT-II", *cit.*, 115-139.

[35] In line with the *Großraum* theory of international law, people as groups of human beings were to be considered as belonging to either of the following categories: "dominant" peoples (*Herrenvölke*) or "subordinate peoples" (*Schlavenvölke*) such conditions attaching to their inner nature as persons. See Hück (2003: 80).

Legitimation).[36] This passage recalls the *Honeywell*[37] argument, *i.e.,* that the conferral boundaries cannot be trespassed in a '*structurally significant* way' (Payandeh, 2011: 9; Waltuch, 2011: 329; Vranes, 2013: 111; Claes & Reestman, 2015: 929). Otherwise – the *BVerfG* says – there would be a loss in substance of the sovereign powers (*Substanzverlust der Herrschaftsgewalt*)[38] that ought never to occur, as the *Grundgesetz* protects the substantive content of the right to vote throughout the whole EU integration process. A '*Generalermächtigung*' (blanket authorisation)[39] to the EU institutions would thus be unconstitutional *per se*, particularly as regards acts grounded on '*andere Legitimationsstränge*' (other strings of legitimation) that do not exhibit a robust link with the people's sovereignty.[40] In fact, such acts have the potential to steer the EU law's evolution *too far* from the original mandate; and, absent an *adequate* legal basis in positive law, this would lead to a disruption of the Euro-unitary constitutional balance.

Second: the *BVerfG* lists in three categories the acts displaying a loose link with the people's sovereignty. Beside 1) the ECB's independence (Art. 130 TFEU), others encompass: 2) acts for whose adoption the Council follows a qualified majority voting procedure (Art. 238 TFEU), and 3) acts adopted by institutions, organs, and all EU bodies in the exercise of an open, effective, and independent administration (Art. 298 TFEU). Under such legal bases – the *BVerfG* holds – implementing the integration programme comes with several drops in influence (*Einflussknicke*), which affects the legitimacy of the acts concerned: '[w]henever the people themselves are not called upon to decide, only those acts that can be traced to Parliament possess democratic legitimation'. Most notably, the *BVerfG* ties such legitimation to parliaments in general, not to the *Bundestag*, which again underscores the universalisability of the argument construed.[41]

These two passages describe the background of the essentiality argument, but still fail to give it solid normative force. In fact, the acts listed are not *ipso facto* in breach of the conferral: the categories are quite vague and potentially all EU law measures could be involved. Thus, it is pertinent to ask what their legal value is – that is, how essentiality may evolve into a legal principle.

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36 *BVerfG*, "OMT-II", *cit*., 115.

37 *BVerfG*, Order of the Second Senate, 6 July 2010 – 2 BvR 2661/06, "Honeywell".

38 *BVerfG*, "OMT-II", *cit*, 125.

39 *Ibid*., 130.

40 *Ibid*., 131.

41 In the German original text: "*[s]oweit nicht das Volk selbst zur Entscheidung berufen ist, ist demokratisch legitimiert nur, was parlamentarisch verantwortet werden kann*": *ibid*., 131.

What the Karlsruhe judges strive to say is that belonging to such categories may affect the *structural significance* of the conferral's breach. Then the question is how this *structural significance* could be *measured* so as to derive a violation of the conferral. In this respect, two further passages need to be unraveled.

First: a structurally significant violation of the conferral must be considered in light of the Maastricht constitutional balance. Then, all the mentioned categories reveal a common distinctive feature: they comprise acts that could in principle disregard the Hirschman-Weiler formula. In other words, acts adopted by institutions, organs or bodies exercising an administrative function, or by an independent Central Bank, or pursuant to a qualified majority vote in Council, all possess a distinctive characteristic: they can produce effects *vis-à-vis* a Member State regardless of the latter's explicit consent. Therefore, there is a possibility of commensurate rights to *Voice* being neglected in spite of an enhanced demand for *Loyalty*.

It can be derived that a *structurally significant* violation of the conferral is one that fails to comply with the Hirschman-Weiler formula. As far as the formula is concerned, the margin of non-compliance can be calculated by taking into account the relation between the legal basis (which displays the rights to *Voice*, as referring to the recipient's explicit consent) and the norm whose effects are sought (which amounts to the demand for *Loyalty*).

Second: while in principle all acts may infringe the conferral, only few of them can make it to the level of a *structurally significant violation* thereof. Relying on the Hirschman-Weiler formula, one may say that such a violation is measurable by a two-dimension relationship: on one side, the span of the legal basis – *i.e.,* the interpretation of the mandate conferred – and, on the other side, the political sensitivity of the effects sought by means of the norm concerned. Therefore, one may say that a legal basis is *adequate* if the interpretation of the provisions thereof is not *too extensive* in relation to the *harm* caused by the effects of the norm adopted in force of that legal basis. Member States, indeed, could certainly adopt some measures of EU law building on a reading of the conferral that is unpredictable on the basis of the mandate and exceeds the meanings attachable to its provisions by the original consent argument; however, the Hirschman-Weiler formula is fulfilled so long as such measures do not impinge on sensitive areas of the recipients' legal sphere. In this case, the adopted measures would not result in a structurally significant violation of the conferral; rather, they would rightfully implement the EU's integration programme.

Conclusively, it can be said that, in response to *Gauweiler*, the *BVerfG* outlines the essentiality argument to defend the constitutional balance set in Maastricht. Essentiality is deployed to prevent a structurally significant

violation of the conferral; such a violation occurs when a norm of EU law builds on a reading of its own legal basis that is too extensive in relation to the political sensitivity of the effects sought. Such norm would raise a demand of *Loyalty* for which no commensurate rights to *Voice* have been awarded; thus, it would affect the substantive content of the right to vote as based on human dignity, *i.e.,* on the self-determination of free women and free men in deciding on the content of the rights that they are to be recognized by public authorities.

VIII. THE *PSPP* JUDGMENT: ANOTHER RING TO THE CHAIN

Following this line, the *PSPP* judgment appears nothing more than another ring added to this chain. The two background passages of essentiality display in a refined version. The first one includes a solemn reference to the universal value attached to the substantive content of the right to vote:

> "…the corresponding right of citizens to be subjected only to such public authority as they can legitimate and influence… This prohibits subjecting citizens to a political authority they cannot escape and in regard of which they cannot in principle influence, on free and equal terms, decisions on the persons in power and on substantive issues".[42]

The Eternity Clause overtly replaces the *Stabilitätsgemeinschaft* orthodoxy with the 'substantive value of the right to vote' whose constitutional anchorage links Arts. 38 (1), 20 (1-2) and 1 (1) with Art. 79(3) GG.[43] The *BVerfG* seals the turn by a crystal-clear sentence: "[t]he purpose of this fundamental right [the right to vote] is not to subject the contents of democratic decision-making to substantive review but to facilitate democratic decision-making processes as such".[44]

The second passage ventures to conceptualize the dynamic potential of the conferral, which must be tamed by the constitutional organs responsible for the integration.[45] Thus, adequate safeguards (*geeignete Sicherungen*) must be provided in order for 'the modalities and the extent of the transfer of sovereign rights to comply with democratic principles':[46] "… [i]t is for the

42 *BVerfG*, "PSPP", *cit.*, 99.
43 *Ibid.*, 101.
44 *Ibid.*, 100-101.
45 *Ibid.*, 102.
46 *Ibid.*, 103.

German *Bundestag*, as the organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core of Art. 20(1) and (2) GG, which is beyond the reach of constitutional amendment".[47]

The extent of this statement seems now clear. The *Bundestag* is responsible for the German national budget *because* it is *the organ directly accountable to the people concerned*. An updated version of the sacred 'no taxation without representation' comes at discussion here: the *BVerfG* makes it clear that no curtailment of that principle will be accepted whatever the legal form of the polity Germany participates in.

'*Based on these standards*'[48] the German judges unfold the essentiality argument by reviewing the proportionality scrutiny carried by the Court of Justice in *Weiss*. In fact, the 'law of the crisis' as a whole comes under investigation: *Pringle* and *Gauweiler* are cited together with *Weiss*, as parts of a single strategy whose compatibility with German – hence, European – constitutional standards is thoroughly questioned.[49]

Communication between the languages of a *loose* proportionality and of an embryonal essentiality is obviously troublesome; the intertwining of identity and proportionality (Cruz Villalón, 2017) makes misunderstandings virtually inevitable (Roca, 2020: 2851). Many thoughtful critiques have focused on the proportionality assessment as the *BVerfG* understands it (Marzal, 2020; Utrilla Fernández-Bermejo , 2020) and on the rightfulness of the review performed (*Editorial Comments*, 2020: 969; Nowak, 2020: 7; Saitto, 2020; but see Avbelj, 2020, and Wilkinson, 2020). Such misunderstandings explain both the grave tone adopted and the apparent one-sidedness of the scrutiny accomplished (Pietersen, 2020: 163). Pursuant to a comparative exam[50] and to an analysis of the Luxembourg case-law[51] the *BVerfG* exposes the manipulation of the proportionality that the Court was urged to perform. Although the German judges struggle to find a suitable vocabulary and a fully-fledged conceptual toolkit to phrase it in essentiality terms, they make it clear that such a manipulation exists and displays in three lines.

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47 *Ibid.*, 104.

48 *Ibid.*, 116.

49 *Ibid.*, 153.

50 *Ibid.*, 125.

51 *Ibid.*, 126; see also at paras. 144-145 as regards the EU Charter of Fundamental Rights and para. 146 as for the law applied in further areas of EU law.

First: since the scrutiny concerned did not focus on the conferral as such, it 'cannot fulfil its corrective function for the purposes of safeguarding the competences of the Member States'.[52]

Second: as admittedly limited to manifest errors, it is 'neither a suitable means for compensating the insufficient limits of the ESCB's competences in terms of its elements ('broad discretion') nor for weighing the encroachment upon the competences of the Member States'.[53] In fact, '…the ECB is free to choose any means it considers suitable even if the benefits are rather slim – compared to possible alternative means –, while collateral damage is high' (Kosta, 2019: 198).[54]

Third, perhaps most seriously, the proportionality scrutiny turns loose exactly when political sensitivity is the highest, and the interests and rights involved the most delicate: thus, a potential violation to these interests and rights is as much painful as unaccounted for (Öberg, 2020; Donaire Villa, 2018: 141; Cohen-Eliya & Porat, 2013: 111). This makes such proportionality arrangement 'simply not comprehensible and thus objectively arbitrary',[55] and the relevant scrutiny "meaningless".[56] Eventually, the *BVerfG* argues that the lack of sufficient justification for the PSPP programme '*results in a structurally significant shift in the order of competences to the detriment of the Member States*'.[57]

The applicative part is presented in two passages.

First: The German Government must ask the ECB to give adequate reasons to account for the PSPP's compatibility with the *Grundgesetz* – that is, with the Maastricht model. Noteworthy, in the explicit wording of the judgment, this request 'would not affect the ECB independence' although it may lead to the formulation of 'instructions' that the ECB might be prompted to seek or take, which would run contrary to Art. 130 TFEU. Probably, this should be seen as a new *Stabilitätsgemeinschaft* manifestation, as far as the *BVerfG*'s *ESM* judgment is concerned.

Second, if a norm of Union law is incompatible with the national constitution, neither its validity nor its effectiveness is affected, but its binding value (*bindingness*: Nino, 1978: 357; Guastini, 2016: 402; compare Sandro, 2018: 99). This outcome perfectly coheres with the trajectory of the EU's constitution-

52 *Ibid.*, 133.
53 *Ibid.*, 140.
54 *Id.*
55 *Ibid.*, 118.
56 *Ibid.*; see at paras. 123, 127, 133, 138, 160, 197.
57 *Ibid.*, 157.

alisation: unconstitutionality would suspend the priority-in-application that the Union law owes to the *Planungs-* and *Wandel-verfassung* concepts, the result of whose joint action is the Maastricht model of Euro-unitary constitutional balance. This perhaps explains what has been labelled as a 'passive aggressivity' strategy adopted by the *BVerfG* in the struggle with the ECB and the ECJ (Martín Rodríguez, 2020: 38).

Conclusively: the *BVerfG*'s evaluation does not completely discern an essentiality review, but early traits of the essentiality principle are outlined. An essentiality argument is openly used, although spelt out as a proportionality argument; furthermore, the outcome of the judgment is consistent with the essentiality concept's background, although the criteria for an essentiality scrutiny are left undefined.

IX. CONCLUSIONS. ESSENTIALITY: AN UNIVERSALISABLE APOLOGY OF THE 'RIGHT TO RESISTANCE'

As a temporary result of a tortuous, yet unfinished journey, the *BVerfG* has depicted early traits of a legal principle – essentiality – that stems from common constitutional traditions and underpins the Euro-unitary constitutional equilibrium reached in Maastricht. This principle requires that norms which go *too* far from the initial mandate (in relation to the political *sensitivity* of the effects sought) be treated as non-binding. For counterintuitive it may be, essentiality, though deployed as an identitarian argument to defend the German legal order against the Union law priority, is universalisable in nature, and polices a balance that comprises all Member States – including Germany – and their citizens alike. Then the *BVerfG*, willing or not, stands in defence of Germany *and*, at the same time, of the Union as a community of self-determining free women and free men.

In the face of the reaction caused (Jiménez-Blanco, 2020: 174) it would be naïve to deny that an essentiality argument bears a supreme political significance. Thus, the criticisms of those who accuse the *BVerfG* of unduly bursting into the political scene are entirely understandable (Davies, 2020; Šadl, 2020; Sarmiento & Utrilla, 2020; Viterbo, 2020: 671; Wendel, 2020: 979). Yet, the German judges did what they are asked to do (Bobić & Dawson, 2020) in a rule-of-law based polity: protecting fundamental rights and principles against actions conducted and managed under full control of the *fragmented executive* (White, 2014: 1; Curtin, 2014: 1). They have acted as a Constitutional Court

that is part to an *alliance*:[58] a *Verbund*, as the then President Voßkuhle (2010: 175) declared in a well-meditated contribution that is both a scientific piece and a political-institutional manifesto.[59]

The *BVerfG* turned political as long as the foundations of that alliance, once commonly accepted, have turned contended – *political*, hence in need of enhanced legitimacy (Mendes & Venzke, 2018: 75). While claiming respect for the conditions of that alliance, Karlsruhe addresses the advocates of *Europe at any cost*, in whose opinion the Europe's common destiny must be preserved even at the expense of the EU's constitutional balance. This latter position, tied to an entirely political option, triggers the essentiality principle, whose ultimate nature is to supply who legitimately rejects such an option with a constitutional argument (Scharpf, 2016: 29, and Rubio Llorente, 1996: 20).

As a matter of fact, such argument builds on a claim that works as the ultimate bulwark in the *fight for the constitution*, 'when no other remedy is available': a *right to resistance*, or *Recht zum Widerstand* (Buratti, 2006: 122, and Ugartemendía, 1999: 213). This right expands from Art. 20(4) *Grundgesetz* – to be sure, not by chance covered by the Eternity Clause – to the EU as a whole and deprives EU law of binding value if it lacks 'democratic authority' (Chalmers, 2020: 18). In other terms: the essentiality argument prevents any EU law's mutations that results in breach of the 'Maastricht model' (Menéndez, 2012: 41; Closa Montero, 2014: 65) from consolidating by generalized acquiescence, whether spontaneous or sealed by overwhelming political coercion.

Conclusively, thanks to the essentiality argument, all Member States can claim that an *equal* treatment be reserved to all: no EU law measure should be applied if it hits sensitive national interests as settled by democratic self-government, particularly if fundamental rights are at stake. This argument would give a reinforced legal substance to the duty of loyal cooperation; it would be addressed to all Member States and to the EU institutions, too, which are bound to respect fundamental rights as associated with their *essential character* whether they act within or outside the EU's legal framework.[60] Thus, solidarity, yet as a consequence of confirmed equality (Rodotà, 2014: 5) receives from

[58] "*Verfassungsverbund*" (Pernice, 1999: 703) is rendered as "Alliance of Constitutions" in Jürgen Habermas, 2012: 344.

[59] Significantly, some German judges have not refrained from going public and explain the rationale of the judgment in the aftermaths thereof (Huber, 2020; Voßkuhle, 2020).

[60] ECJ, Case 370/12, 27 November 2012, *Pringle*, ECLI:EU:C:2012:756, par. 158.

essentiality a formidable support, for counterintuitive it might look in the first place.

In light of the essentiality principle, early traits of which appear today in a glowing fashion, the core of the *BVerfG*'s compelling defence amounts to a supreme Maastricht's legacy, which defends human dignity on a national and European scale as individual and collective self-determination of free and equal human persons and preserves it as part of Europe's common constitutional traditions (Rodríguez Izquierdo-Serrano, 2012: 63; Ninatti & Pollicino, 2020, 191).

Eventually, one may say, the nuclear option the judgment has allegedly activated (Estella de Noriega, 2020; Sarmiento & Utrilla, 2020; Scaccia, 2020: 1) could surprisingly result in a renovated political impulse towards more *acceptable* common arrangements. The Union, faced with the most recent challenges posed by the pandemic, seems responsive to arguments fostering solidarity and equality. All in all, it is nothing less than the political future of the EU what comes under question. Then, the *PSPP* judgment has put on the shoulders of Europe's political leaders an unprecedented pressure, which adds to the pandemic crisis to urge for crucial political decisions. Should all this result in a significant improvement of the EMU's architecture (López Escudero, 2015: 361) then the *Euro-unitary* constitutional stance that the German judges defended would shine in a brighter light, and their qualification as the 'Union's gravediggers' (Soriano García, 2020) would perhaps need a re-examination. Anyhow, whatever the political outcome, even the most tenacious opponents of the Karlsruhe Court would maybe subscribe to the following point: a defence of the 'substantive right to democracy' should never be caught in contrast with the aim of an 'ever closer Union'. Otherwise, that right would stay excluded from the operational scope of both the Union and the Member States; the ultimate fading of self-determination as a distinctive criterion for the EU law-making's legitimacy could entail an authoritarian turn of the European constitutionalization (Wilkinson, 2020), which would hardly cohere with both national constitutional laws and the Union's core values (Spieker, 2020: 361; Paris, 2019: 225). Then, the European construction would fall from the 'constitutional dream' into a sort of *sueño de la razón* (Requejo Pagés, 2016: 204), the Union easily falling prey of the monsters it generates.

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